

1870.
March 22.

Special Appeal No. 546 of 1869.

GOPA'L YA'DAVRA'V KESKAR.....*Appellant.*
KRISHN'A'PPA' bin MAHA'DA'PPA'.....*Respondent.*

Hindú—Dakhan Mortgage—Possession—Purchaser with Notice—Constructive Fraud.

The mortgagee without possession of certain lands in the Dakhan (under a mortgage-deed of the 1st of August 1864) on the 16th of April 1867 obtained a decree awarding to him possession of the mortgaged premises. On the 11th of July following, the mortgagor sold the mortgaged premises to the plaintiff, who had distinct notice of the mortgage. The deed of sale was duly registered. The plaintiff thereupon claimed to hold the premises free from the mortgage.

Held that, though a mortgage in the Dakhan must be accompanied by possession to give it validity against third parties, it is not absolutely void for want of such possession, and that the plaintiff, having notice of it, should not be allowed to hold the premises free from the mortgage.

THIS was a special appeal from the decision of S. H. Phillpotts, Acting Senior Assistant Judge of Solápur, in Appeal Suit No. 49 of 1869, confirming the decree of the Munsif of Bársí.

The plaintiff, Gopál Yádavráv, petitioned, under Sec. 230 of Act VIII. of 1859, to recover possession of a field (Survey number 269) in Mouje Khorephal, from the defendant, under the following circumstances:—

The plaintiff, Gopál Yádavráv, obtained a decree upon a money-bond against one Hari Rájárám, on the 7th of February 1867, and attached the land in dispute in execution of the decree on the 8th of February 1867. The defendant, Krishnáppá bin Mahádáppá, had a mortgage upon the land under a mortgage-bond dated the 1st of August 1864. This mortgage-bond was unregistered, and Hari Rájárám, the mortgagor, continued in possession. When the plaintiff petitioned for the sale of the land attached by him, the defendant opposed the application, and applied to the court to have the land sold subject to his mortgage-claim. The court, accordingly, ordered the land to be sold subject to the defendant's mortgage. Soon after, on the 11th of July 1867, Hari Rájárám sold the land privately to the plaintiff, in satisfaction of his claim under the decree, and gave him possession. The deed

of sale was registered. The plaintiff's tenant in possession was dispossessed by the defendant, who, on the 16th of April 1867, had obtained a decree upon his mortgage-bond, ordering this property to be held by him till his mortgage was paid off, and in the execution of the decree he obtained possession of the land; and the plaintiff proceeded, under Sec. 230 of Act VIII. of 1859, to recover possession from the defendant.

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The defendant answered that the private sale to the plaintiff was fraudulent, as, on the defendant's application in the execution proceedings consequent on the attachment by the plaintiff, the court had directed the land to be sold subject to the defendant's mortgage-lien. Upon the execution by Hari Rájárám of the deed of sale, the plaintiff withdrew his *dar-khást*. The defendant further stated that he was in possession.

The Munsif of Bársí held that the land sold to the plaintiff was sold subject to the defendant's mortgage-lien, which, he held, was not invalid by reason of its being unregistered. He, accordingly, decreed that the plaintiff could not recover till the defendant's mortgage was paid off.

The plaintiff appealed to the District Court, and S. H. Phillpotts confirmed the decree of the Munsif, holding that "the appellant purchased the property with the mortgage-lien upon it. Hari Rájárám had no right to sell what was not his own, so, when he sold this field as unincumbered, he sold what he could not sell, because, on the 16th of April 1867, this property had been decreed to be held by the respondent till his mortgage-lien was paid off, and in that case Hari Rájárám was the defendant, and it was on account of his debt that this decree was made. This being the case, Hari Rájárám had no right on the 11th of July 1867 to sell the property as unincumbered to the appellant, and the appellant was rightly ejected, under Sec. 223 of Act VIII. of 1859, as the appellant cannot be in a better position than his vendor." He, accordingly, confirmed the Munsif's decree with costs.

The plaintiff appealed from this decision, and the appeal was argued before COUCH, C.J., and MELVILLE, J.

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Dhirajlal Mathuradas, for the appellant :—This is a Dakhan mortgage, in which it is necessary that the mortgagee should be in possession to affect other incumbrancers or purchasers. Admitting that the appellant had notice of the mortgage-claim, it was a notice of a mortgagee without possession.

Shantaram Narayan, for the respondent :—The title of the plaintiff under the bill of sale was created subsequent to the institution of the suit. The attachment was in February; from that date till July, when the sale took place, the plaintiff was only a creditor, and the decree did not bind the land. Meanwhile the defendant obtained his foreclosure decree on the mortgage-bond in April, so that the decree bound the land at the time of the sale to the plaintiff. The plaintiff is only a subsequent purchaser with notice of the previous incumbrance.

Cur. adv. vult.

COUCH, C.J. :—In this suit, which is founded upon an application to the Munsif of Barsi under Sec. 230 of Act VIII. of 1859, the facts are these. On the 1st of August 1864 Hari Rajaram Joshi mortgaged the land in dispute to the respondent, the original defendant. The land being situated in the Dakhan, it was necessary, according to the decisions of the Sadr Adalat—*Mulapa Mitaigar v. Rungapa*, S. A. 24 of 1860 (a); *Govurdhan Doolubdas v. Sukharam Ramchunder*, S. A. 23 of 1861 (b); and *Chutrajee Dullajee v. Krishna Ramasett*, S. A. 24 of 1861 (c), that the mortgage should be accompanied by possession to give it validity. Possession was not given, but the Hindu law in force in the Dakhan does not make the contract in that case void. The contract is a valid one, and the mortgagee is entitled to possession, if default is made in payment of the mortgage-money. And, accordingly, on the 16th of April 1867, the respondent obtained a decree awarding possession of the land to him on default being made in payment of the money secured by the mortgage-bond. In the mean time, on the 7th of February 1867, the appellant, the plaintiff in this suit, having obtained a decree on a money-bond, attached the land, and the respondent applied to the court that

(a) 9 Harrington 499. (b) 8 Harrington 189. (c) Ibid. 193.

it might be sold subject to his mortgage, which was ordered. The appellant had thus distinct notice of the mortgage, and for the purpose of notice to him it does not matter whether the order was regular or not—as a mortgagee not in possession could not come within Sec. 230 of Act VIII. of 1859 by being dispossessed, it may not have been a proper order. On the 11th of July 1867 Hari Rájárám Jéshi sold the land to the appellant, and he thereupon claimed to be entitled to it free from the mortgage. The Munsif of Bársí held that his right to it was subject to the mortgage to the respondent, and his decree was confirmed by the Acting Senior Assistant Judge, from whose decision the plaintiff has brought this special appeal. Now the appellant before his purchase not only had notice of the mortgage, but in a proceeding to which he was a party, being the attaching creditor, an order was made that the land should be sold subject to it. It would be contrary to one of the most settled principles of equity to allow the appellant to recover possession of the lands freed from the mortgage, which is what he sought by his application, and now seeks by this appeal. The case belongs to the class of constructive frauds, in which the title of the purchaser is postponed and made subservient to that of the claimant of whose title he has notice. The objection taken by the appellant, that Sec. 223 of Act VIII. of 1859 is applicable to this case, cannot be allowed. For, supposing the decree of the 16th of April 1867 did not entitle the respondent to the possession, this objection is not consistent with the case made by the plaint, which does not seek to recover possession subject to the mortgage, but denies the right of the mortgagee altogether. And, further, it appears not to have been taken in either of the lower courts. We consider that in holding in this case that the appellant can only take the land subject to the mortgage we are not opposed to the rulings of the Şadr Adálat as to mortgages in the Dakhan. We are indeed only preventing the Hindú law, as there laid down, being used for the purpose of fraud. The decree must, I think, be confirmed with costs.

MELVILL, J., concurred.

Decree confirmed with costs.

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